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Third report on the effects of armed conflicts on treaties

by Mr. Ian Brownlie, Special Rapporteur

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A. Introduction

1. As a consequence of the exigencies of completing various agenda items, or completing a first reading, experienced by the International Law Commission in the final session of the quinquennium, the results of the first and second reports on the present topic (A/CN.4/552 and A/CN.4/570 and Corr.1, respectively) did not include embarking upon a first reading. Moreover, the second report was limited to a summary of the points made during the debates on the first report in the Commission and the Sixth Committee, respectively. At the fifty-eighth session of the Commission, there was a somewhat perfunctory discussion of the second report.

2. In the circumstances, the first report stands as the definitive study, together with the second report as a supplement. The second report contained no new drafting.

3. In preparing the present report, account has been taken of the useful memorandum prepared by the Secretariat, entitled "The effect of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1 and 2).

4. In the present report, the commentary relies upon cross reference to the first report commentaries.

5. Draft article 6 of the previous reports has been withdrawn.

B. Draft articles

Draft article 1
Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

Comment

6. The provisions of article 1 of the Vienna Convention on the Law of Treaties[1] have been followed (see also article 1 of the Vienna Convention on Succession of States in respect of Treaties[2]). The term "treaty" is defined in draft article 2 below.

7. In the Sixth Committee several delegations expressed the view that the draft articles should apply to articles which were being provisionally applied.[3] The issue can be resolved by reference to the provisions of article 25 of the Vienna Convention itself. There are further complexities but it is not appropriate to set about elaborating the provisions of the Vienna Convention.

8. During the debates at the fifty-seventh session of the Commission, in 2005, the view was expressed that the topic should be expanded by the inclusion of treaties

[1] United Nations, *Treaty Series*, vol. 1155, p. 331.
[2] Ibid., vol. 1946, p. 3.
[3] See comments by the Netherlands (2005), A/C.6/60/SR.18, para. 40; and Malaysia (2006), A/C.6/61/SR.19, para. 48.

entered into by international organizations.[4] Similar views were expressed in the Sixth Committee.[5]

9. The Special Rapporteur is of the opinion that the proposed expansion is based upon a less than mature consideration of the difficulties of "adding on" a qualitatively different subject matter. The United Kingdom expressed the following reservations in the Sixth Committee in 2006:

> In relation to the inclusion in the study of treaties involving international organisations, the United Kingdom consider that such treaties are perhaps best not included. As we have commented in relation to the topic of responsibility of international organisations, there is a vast variety of international organisations and their functions. We question whether the specificity of such organisations and their treaty arrangements could be dealt with in this study. Moreover, the issues concerning international organisations and armed conflict may be very different to those arising from States and armed conflict.[6]

10. The Special Rapporteur considers these are considerations which should not be rejected lightly.

Draft article 2
Use of terms

For the purposes of the present draft articles:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(b) "Armed conflict" means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between State parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

[4] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 129.

[5] See the comments by Morocco (2005), A/C.6/60/SR.11, para. 41; China (2005), A/C.6/60/SR.18, para. 8, and (2006), A/C.6/61/SR.18, para. 44; Nigeria (2005), A/C.6/60/SR.20, para. 47; Jordan (2005), A/C.6/60/SR.19, para. 32, and (2006), A/C.6/61/SR.18, para. 85; Indonesia (2005), A/C.6/60/SR.20, para. 9; Austria (2006), A/C.6/61/SR.18, para. 25; Bulgaria (2006), ibid., para. 20; and Romania (2006), A/C.6/61/SR.19, para. 63. This expansion of the topic was opposed by the Republic of Korea (2005), A/C.6/60/SR.18, para. 31; India (2006), A/C.6/61/SR.19, para. 28; Malaysia (2006), ibid., para. 48; and the United Kingdom (2006), ibid., para. 44.

[6] Summarized in document A/C.6/61/SR.19, para. 44.

Comment

Treaty

11. The definition is taken from the Vienna Convention on the Law of Treaties. The meaning and application of the definition is elucidated in the commentary of the Commission in the report of the Commission to the General Assembly in 1966.[7] The definition is adequate for present purposes and, in any case, it is not appropriate for the Commission to seek to revise the Vienna Convention.

Armed conflict

12. The reader is referred to the substantial commentary included in the first report (A/CN.4/552, paras. 16-24), and the second report (A/CN.4/570 and Corr.1, paras. 8-13). This material is now supplemented in certain respects. In the first place, the division of opinion in the Sixth Committee on the question of including internal armed conflict continued in 2006. The full census is as follows:

(a) States opposed to inclusion: Algeria (2005),[8] Austria (2005)[9] and (2006),[10] China (2005)[11] and (2006),[12] Colombia (2006),[13] India (2006),[14] Indonesia (2006),[15] Islamic Republic of Iran (2005)[16] and (2006),[17] Portugal (2006),[18] and the United Kingdom (a preliminary view) (2006);[19]

(b) States in favour of inclusion: Greece (2005),[20] Japan (2006),[21] Malaysia (2006),[22] Morocco (2005),[23] Nigeria (2005),[24] the Netherlands (2006),[25] Poland (2005),[26] Romania (2006),[27] Sierra Leone (2006)[28] and Slovakia (2005).[29]

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[7] *Yearbook of the International Law Commission, 1966*, II, pp. 187-189, paras. 1-8.
[8] A/C.6/60/SR.20, para. 64.
[9] A/C.6/60/SR.18, para. 26.
[10] A/C.6/61/SR.18, para. 25.
[11] A/C.6/60/SR.18, para. 8.
[12] A/C.6/61/SR.18, paras. 45-46.
[13] Ibid., para. 64.
[14] A/C.6/61/SR.19, para. 28.
[15] Ibid., para. 19.
[16] A/C.6/60/SR.18, para. 2.
[17] A/C.6/61/SR.19, para. 32.
[18] A/C.6/61/SR.18, para. 76.
[19] A/C.6/61/SR.19, para. 44.
[20] A/C.6/60/SR.19, para. 36.
[21] A/C.6/61/SR.18, para. 28.
[22] A/C.6/61/SR.19, para. 50.
[23] A/C.6/60/SR.11, para. 41.
[24] A/C.6/60/SR.20, para. 47.
[25] A/C.6/61/SR.18, para. 33.
[26] A/C.6/60/SR.19, para. 18.
[27] A/C.6/61/SR.19, para. 63.
[28] Ibid., para. 70.
[29] A/C.6/60/SR.19, para. 45.

13. The tally is thus 9 delegations opposed to inclusion and 10 delegations in favour of inclusion. The division of opinion has been reflected in the debates in the Commission.[30]

14. In conclusion, the following points can be made by way of emphasis. In the first place, the policy considerations point in different directions. Secondly, in practice, and at the factual level, there is sometimes no distinction between international and non-international armed conflicts. Thirdly, the drafting of draft article 2 (b) avoids according an automatic effect to non-international armed conflict. And, in this connection, attention must be paid to draft article 3 below.

15. In any case it is common for colleagues to ignore the qualification attached to the definition of "armed conflict". The definition is proposed "for the purpose of the present draft articles". It is not the business of the Commission to seek to design an all-purpose definition of "armed conflict".

Draft article 3
Non-automatic termination or suspension

The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:

(a) Between the parties to the armed conflict;

(b) Between one or more parties to the armed conflict and a third State.

Comment

16. The reader is referred to the commentaries provided in the first report (A/CN.4/552, paras. 25-28), and second report (A/CN.4/570 and Corr.1, paras. 14-17). There are two alterations to the text. The title has been changed and the phrase ipso facto eliminated. In the text the term ipso facto has been deleted and replaced by "necessarily".

17. As explained in the first report, draft article 3 is the most significant product of the resolution adopted by the Institute of International Law in 1985. The majority of the delegations in the Sixth Committee did not find draft article 3 to be problematical. Austria expressed the view that the underlying concept of draft article 3 "is the point of departure of the whole set of draft articles".[31] As a number of delegations have recognized, draft article 3 reflects an underlying policy and is simply a point of departure. The provisions of draft article 3 are without prejudice to the operation of draft articles 4 to 7 which follow. This series of draft articles is to be read in sequence and conjointly.

18. Certain delegations opposed the replacement of "ipso facto" with "necessarily", on the ground that "necessarily" is less incisive.[32] In the opinion of

[30] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), paras. 139-140; and ibid., *Sixty-first Session, Supplement No. 10* (A/61/10), paras. 192-193.

[31] See A/C.6/60/SR.18, para. 27.

[32] See Malaysia (2006), A/C.6/61/SR.19, para. 51; Jordan (2006), A/C.6/61/SR.18, para. 87; Colombia (2006), ibid., para. 65; and Austria (2005), A/C.6/60/SR.18, para. 27. See also the comment of China (2006), A/C.6/61/SR.18, para. 48.

the Special Rapporteur there is no evident difference of meaning between the two terms.

19. The general opinion in the Sixth Committee during the fifty-seventh and fifty-eighth sessions of the Commission was that draft article 3 played a useful role and should be retained.

Draft article 4
The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

(a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(b) The nature and extent of the armed conflict in question.

Comment

20. The reader is referred to the commentaries provided in the first report (A/CN.4/552, paras. 29-54), and second report (A/CN.4/570 and Corr.1, paras. 18-28).

21. The reference to intention attracted considerable attention in the Sixth Committee and opinion was divided as follows:

(a) States in favour of the criterion of intention: Algeria (2006),[33] China (2005)[34] and (2006),[35] Greece (2005),[36] India (2006),[37] Islamic Republic of Iran (2006),[38] Jordan (2005)[39] and (2006),[40] Malaysia (2006),[41] Romania (2005)[42] and United Kingdom (2005)[43] and (2006).[44]

[33] See A/C.6/61/SR.19, para. 39.
[34] See A/C.6/60/SR.18, para. 9.
[35] See A/C.6/61/SR.18, para. 47.
[36] See A/C.6/60/SR.19, para. 37.
[37] See A/C.6/61/SR.19, para. 28.
[38] Ibid., para. 32.
[39] See A/C.6/60/SR.19, para. 30.
[40] See A/C.6/61/SR.18, para. 88.
[41] See A/C.6/61/SR.19, para. 52.
[42] See A/C.6/60/SR.19, para. 41.
[43] See A/C.6/60/SR.20, para. 1.
[44] See A/C.6/61/SR.19, para. 44.

(b) States regarding the criterion of intention as problematical: Austria (2005),[45] Bulgaria (2006),[46] Colombia (2006),[47] France (2005),[48] Japan (2005),[49] Republic of Korea (2005),[50] Portugal (2006)[51] and the United States (2005).[52]

22. There was a similar division of opinion during the debates in the Commission.[53] The quality of the debate was not enhanced by assertions of omissions from draft article 4, which were mistaken, or by an unwillingness of some colleagues to read the text of draft article 4 as a whole, and in relation to the following articles. Draft article 4 refers to articles 31 and 32 of the Vienna Convention by reference, and yet some States, and some colleagues, have suggested that there should be reference to the text, or the object and purpose, of the treaty. The provisions of article 31 read as follows:

"General rule of interpretation

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

"2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

"(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

"(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

"3. There shall be taken into account, together with the context:

"(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

"(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

"(c) Any relevant rules of international law applicable in the relations between the parties.

"4. A special meaning shall be given to a term if it is established that the parties so intended."

23. And thus there is in these provisions reference both to the text and to the object and purpose. A connected point is that it is not appropriate for the Special

[45] See A/C.6/60/SR.18, para. 27.
[46] See A/C.6/61/SR.18, para. 23.
[47] Ibid., para. 65.
[48] See A/C.6/60/SR.11, para. 75.
[49] See A/C.6/60/SR.20, para. 22.
[50] See A/C.6/60/SR.18, para. 34.
[51] See A/C.6/61/SR.18, para. 77.
[52] See A/C.6/60/SR.20, para. 32.
[53] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), paras. 151-153, and ibid., *Sixty-first Session, Supplement No. 10* (A/61/10), para. 203.

Rapporteur to reinvent the wheel, and, in any case, the Commission has no mandate to revise and amend the Vienna Convention.

24. The opposition to the reliance upon intention is normally based upon the problems of ascertaining the intention of the parties, but this is true of so many legal rules, including legislation and constitutional provisions. The Statute of the Commission provides no warrant for post-modernist heresies. In a general perspective, the difference between the two points of view expressed in the Sixth Committee is probably not, in practical terms, substantial. As article 31 of the Vienna Convention makes clear, the meaning of a treaty may be proved by a variety of means. In any event, the existence and interpretation of a treaty is not a matter of intention as an abstraction, but an intention of the parties "as expressed in the words used by them and in the light of the surrounding circumstances".[54] The ultimate consideration is, what is the aim of interpretation? Surely, it is to discover the intention of the parties and not something else.[55]

25. It has been suggested that the legal consequences of suspension or termination should be defined.[56] But to do that would be to elaborate the provisions of the Vienna Convention, which is not an appropriate task.

Draft article 5
Express provisions on the operation of treaties

Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

Comment

26. The reader is referred to the commentaries provided in the first report (A/CN.4/552, paras. 55-58), and second report (A/CN.4/570 and Corr.1, paras. 29-31). While the provisions of draft article 5 received general support, both in the Commission and in the Sixth Committee, several suggestions were made to the effect that it was necessary to present the two paragraphs as separate articles. The Special Rapporteur has recognized the force of these suggestions and proposes the inclusion of former paragraph 2, of draft article 5, in new draft article 5 bis.

27. On a strict view of drafting this draft article was redundant, but it was generally accepted that such a provision should be included for the sake of clarity.

Draft article 5 bis
The conclusion of treaties during armed conflict

The outbreak of an armed conflict does not affect the capacity of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.

[54] See McNair, *The Law of Treaties*, 1961, p. 365.
[55] See Reuter, *Introduction to the Law of Treaties*, 2nd ed., 1985, paras. 141-142.
[56] See the statement by Austria (2005), A/C.6/60/SR.18, para. 27.

Comment

28. This provision, previously included as paragraph 2 of draft article 5, is now presented as a separate draft article. The term "competence" has been deleted and replaced by "capacity". This draft article is intended to reflect the experience of belligerents in an armed conflict concluding agreements between themselves during the conflict (see A/CN.4/552, paras. 56-57).

Draft article 6

29. Draft article 6 has been withdrawn by the Special Rapporteur.

Draft article 6 bis
The law applicable in armed conflict

The application of standard-setting treaties, including treaties concerning human rights and environmental protection, continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict.

Comment

30. This new draft provision originates in certain responses to draft article 5, in its earlier form. A number of delegations in the Sixth Committee proposed the inclusion of a provision based upon the principle stated by the International Court of Justice in the *Nuclear Weapons* advisory opinion[57] relating to the relation between human rights and the applicable *lex specialis*, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[58] Similar views were expressed in the Commission.[59]

31. While the principle now embodied in draft article 6 bis may be said to be, strictly speaking, redundant, the role of the provision in this expository draft is to provide a useful clarification.

Draft article 7
The operation of treaties on the basis of necessary implication from their object and purpose

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

2. Treaties of this character include the following:

(a) Treaties expressly applicable in case of an armed conflict;

(b) Treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

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[57] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports, 1996,* p. 226 at 240, para. 25.

[58] See the views of the United States (2005), A/C.6/60/SR.20, para. 33.

[59] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 159; and ibid., *Sixty-first Session, Supplement No. 10* (A/61/10), para. 206.

(c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

(d) Treaties for the protection of human rights;

(e) Treaties relating to the protection of the environment;

(f) Treaties relating to international watercourses and related installations and facilities;

(g) Multilateral law-making treaties;

(h) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(i) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

(j) Treaties relating to diplomatic relations;

(k) Treaties relating to consular relations.

Comment

32. The reader is referred to the commentaries provided in the first report (A/CN.4/552, paras. 62-118); and in the second report (A/CN.4/570 and Corr.1, paras. 34-42).[60]

33. Draft article 7 attracted comments both fairly numerous and very varied in content. The points of view expressed can be classified as follows:

(a) Is draft article 7 necessary?

34. A number of delegations in the Sixth Committee adopted the position that the whole provision was redundant, in view of the role already played by draft articles 3 and 4. The Special Rapporteur had some sympathy with this position and consequently made the following suggestion:

> At the end of the day, it may be that the solution lies within the realm of presentation. On this basis draft article 7 would be deleted; as has been emphasised already, its purpose was indicative and expository. The question then is to find an appropriate container for the materials on which draft article 7 has been built. The obvious answer would be an annex containing an analysis of the State practice and case law which could be prepared by the Secretariat with assistance from the Special Rapporteur.[61]

[60] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), paras. 167-175; and ibid., *Sixty-first Session, Supplement No. 10* (A/61/10), paras. 209-211.

[61] See A/CN.4/570 and Corr.1, para. 37.

(b) The inclusion in paragraph 2 of reference to treaties codifying *jus cogens* rules

35. The Special Rapporteur does not regard the inclusion of treaties or treaty provisions codifying *jus cogens* rules[62] as acceptable. Such possibility raises a major question of general international law, and one which is notoriously difficult. Moreover, this category is not qualitatively similar to the other categories which have been proposed.

(c) The role of an indicative list of categories of treaties

36. In the Sixth Committee at least five delegations accepted the role of an indicative list of categories of treaties, though with reservations relating to the substance of the categories proposed.[63]

(d) Opposition to the use of an indicative list

37. A number of delegations were opposed to, or sceptical about, the viability of, the use of an indicative list of categories of treaties.[64]

(e) The enumeration of factors relevant to the determination that a given treaty should continue in operation in the event of armed conflict

38. In the Sixth Committee six delegations expressed support for the identification of factors relevant to the determination that a given treaty should continue in operation in the event of armed conflict.[65] It is worth noting that this field of opinion was in favour of the retention of draft article 7 in some form.

(f) The formulation of draft article 7

39. In the debate in the Commission in the 2005 session, the policy of the provisions of draft article 7 was explained by the Special Rapporteur as follows:

> The Special Rapporteur observed that the draft article 7 dealt with the species of treaties the object and purpose of which involved the necessary implication that they would continue in operation during an armed conflict. Paragraph 1 established the basic principle that the incidence of armed conflict would not, as such, inhibit the operation of those treaties. Paragraph 2 contained an indicative list of some such categories of treaties. It was observed that the effect of such categorization was to create a set of weak rebuttable presumptions as to the object and purpose of those types of treaties, i.e. as evidence of the object and purpose of the treaty to the effect that it survives a war. He clarified that while he did not agree with all the categories of treaties

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[62] See memorandum prepared by the Secretariat (A/CN.4/550 and Corr.1 and 2, para. 31).

[63] See Bulgaria (2006), A/C.6/61/SR.18, para. 23; Jordan (2006), ibid., para. 89; Republic of Korea (2005), A/C.6/60/SR.18 , para. 36; Portugal (2006), A/C.6/61/SR.18, para. 78; and Romania (2005), A/C.6/60/SR.19, para. 43.

[64] See the position of India (2005), A/C.6/60/SR.18, para. 64; Poland (2005), A/C.6/60/SR.19, para. 19; the United Kingdom (2005), A/C.6/60/SR.20, para. 1; and the United States (2005), ibid., para. 34 and (2006), A/C.6/61/SR.19, para. 41.

[65] See the views of China (2006), A/C.6/61/SR.18, para. 49; Colombia (2006), ibid., para. 67; India (2006), A/C.6/61/SR.19, para. 29; Malaysia (2006), ibid., para. 54; the United Kingdom (2006), ibid., para. 44; and the United States (2005), A/C.6/60/SR.20, para. 32, and (2006), A/C.6/61/SR.19, para. 41.

> in the list, he had nonetheless included them as potential candidates for consideration by the Commission. The list reflected the views of several generations of writers and was to a considerable extent reflected in available State practice, particularly United States practice dating back to the 1940s. While closely linked to draft articles 3 and 4, the draft article was primarily expository and could accordingly be excluded.[66]

40. The fact is that the provisions of draft article 7 are very flexible. Moreover, it is not exclusive to the categories introduced but applies generally. Thus the second paragraph provides that: "Treaties of this character include the following ..."

41. The use of categories was the object of carefully articulated comment by the United States in the Sixth Committee, at the sixtieth session of the General Assembly, in 2005, and it must be quoted once more:

> Article 7 deals with the operation of treaties on the basis of implications drawn from their object and purpose. It is the most complex of the draft articles. It lists twelve categories of treaties that, owing to their object and purpose, imply that they should be continued in operation during an armed conflict. This is problematic because attempts at such broad categorisation of treaties always seem to fail. Treaties do not automatically fall into one of several categories. Moreover, even with respect to classifying particular provisions, the language of the provisions and the intention of the parties may differ from similar provisions in treaties between other parties. It would be more productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict. The identification of such factors would, in many cases, provide useful information and guidance to States on how to proceed.[67]

42. As was pointed out in the second report, the categories employed in draft article 7 may stand in need of improvements, but the fact is that most of the categories are derived directly from the policy prescriptions and legal assessments of leading authorities, together with a significant amount of jurisprudence and practice. If the first report is properly examined, it can be seen that the categories employed are not abstract but have strong roots in the matrix of legal sources.

43. Against this background it can be argued that the categories reflect the very factors to which the United States refers in the statement quoted above.

(g) Retaining the categories in draft article 7

44. In the second report the Special Rapporteur made a tentative proposal to delete draft article 7, but to produce an annex containing an analysis of the State practice and case law, which could be prepared by the Secretariat. After further thought, the Special Rapporteur has discarded this proposal and has decided to maintain the original approach adopted in draft article 7.

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[66] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 167.

[67] Summarized in A/C.6/60/SR.20, para. 34.

45. The reasons for this decision are as follows (and in no particular order):

(a) The existing form of draft article 7 still provides a good basis for a fruitful discussion, together with the relevant sections of the memorandum prepared by the Secretariat;

(b) The proposals for an alternative approach by way of relevant factors do not have enough merit and would probably increase the ills which have been accredited to the categories;

(c) The categories put forward by the Special Rapporteur are based upon a considerable quantity of legal experience and doctrine;

(d) The relation between the sequence of draft articles is legally significant and should be maintained.

(h) The significance of State practice

46. A number of delegations have pointed out that some of the categories of treaties offered as candidates for inclusion in draft article 7 do not find much support in the practice of States.[68] Having surveyed the available legal sources, it becomes clear that there are two different situations. The first relates to those cases, such as treaties creating permanent regimes, which have a firm base in State practice. The second situation relates to cases which have a firm basis in the jurisprudence of municipal courts and some executive advice to courts, but are not supported by State practice in a conventional mode.

47. These considerations lead to the important question: should the Commission close the door to those categories of treaty which have substantial recognition in reliable legal sources, in the absence of support by State practice as such? Given the mandate of the Commission to promote "the progressive development of international law *and* its codification" (emphasis added), it would seem to be inappropriate to insist that the categories of treaties admitted to the second paragraph of the draft article should all constitute a part of existing general international law. This is not the applicable standard of admission.

48. With reference to evidence of State practice, two other points should be made. In the first place, the likelihood of a substantial flow of information from States is small. And, secondly, the identification of relevant State practice is, in this sphere, unusually difficult. It often is the case that apparent examples of State practice concern legal principles which bear no relation to the effect of armed conflict on treaties as a precise legal issue. For example, some of the modern State practice which has been cited[69] refers, for the most part, to the effect of a fundamental change of circumstances,[70] or to the supervening impossibility of performance, and is accordingly irrelevant.

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[68] See the views of Chile (2006), A/C.6/61/SR.19, para. 7; Jordan (2006), A/C.6/61/SR.18, para. 89; Republic of Korea (2005), A/C.6/60/SR.18, para. 36; and Malaysia (2006), A/C.6/61/SR.19, para. 54.

[69] See A/CN.4/550 and Corr.1 and 2, paras. 82-91.

[70] See the analysis of the conflict in the Former Yugoslavia, ibid., paras. 111-113.

(i) The role of *lex specialis*

49. In the Sixth Committee a number of delegations indicated that draft article 7 needed clarification in respect of the role of *lex specialis*. Accordingly, it should be made clear that the implication of continuity does not affect the application of the law of armed conflict as the *lex specialis* applicable in times of armed conflict.[71]

50. The Special Rapporteur agrees that such clarification is desirable and therefore proposes the inclusion of draft article 6 bis.

(j) The categories of treaties to be included in draft article 7

51. It has already been indicated that the Special Rapporteur has decided to maintain draft article 7 in its present form. Notwithstanding the criticisms expressed in some quarters, the existing format still provides a useful starting point for further debate. It must also be recalled that a proportion of the categories deployed are supported by the legal sources, including some State practice. It may be that, if the use of categories of treaties is maintained, the existing selection of eleven categories should be varied.

52. In examining the available materials careful account has been taken of the 16 categories proposed in the memorandum prepared by the Secretariat (A/CN.4/550 and Corr.1 and 2, paras. 17-78). The selection proposed therein overlaps substantially with the selection produced in draft article 7 in the first and second reports. No doubt some of the categories in the memorandum not represented in the work of the Special Rapporteur may receive sponsorship in the future, either in the Sixth Committee or in the Commission. In the meanwhile, the selection proposed by the Special Rapporteur has been maintained.

53. It is to be noted that there have been very few proposals for the deletion of the categories deployed by the Special Rapporteur. However, the delegation of the United Kingdom expressed scepticism concerning the inclusion of treaties relating to the protection of the environment.[72]

54. By way of emphasis, it should be stated that the categories are indicative and are expressed *not* to be an exclusive list. Thus draft article 7, paragraph 1, provides clearly that "the incidence of an armed conflict will not *as such* inhibit their operation." (emphasis added). In the second place, the provision does not seek to prejudice the question of the applicable law, whether this constitutes *lex specialis* or otherwise. The logical progression must be that if the operation of a treaty is inhibited, then *necessarily* it will not form part of the applicable law.

55. In conclusion, draft article 7 is indicative and it is paragraph 1 which governs. Consequently, the "object and purpose" criterion is generally applicable. Draft article 7 is ancillary to draft articles 3 and 4.

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[71] See the views of the delegations of Republic of Korea (2005), A/C.6/60/SR.18, para. 36, and the United Kingdom (2005), A/C.6/60/SR.20, para. 1. The United States made a similar observation in the context of draft article 5 (2005), A/C.6/60/SR.20, para. 33.

[72] See A/C.6/60/SR.20, para. 1.

(k) The options available

56. It is useful to end this long recital with a list of options which are available in light of the various discussions of draft article 7. Four options appear to be available:

(a) The deletion of the draft article on the basis that it is not needed because draft articles 3 and 4 already do the work;

(b) The maintenance of the draft article in its present form but with some variations in the identification of appropriate categories of treaties;

(c) The substitution of a new paragraph 2 relying not upon categories of treaties but upon relevant factors or criteria;

(d) The deletion of draft article 7 accompanied by the preparation of an annex containing an analysis of the State practice and case law.

Draft article 8
Mode of suspension or termination

In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the Law of Treaties.

Comment

57. In the first report it was stated that the point in play here stems from the consideration that suspension or termination does not take place ipso facto and by operation of law.

Draft article 9
The resumption of suspended treaties

1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:

(a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(b) With the nature and extent of the armed conflict in question.

Comment

58. Draft article 9 constitutes the further development of draft article 4, which lays down the general criterion of intention.

Draft article 10
Effect of the exercise of the right to individual or collective self-defence on a treaty

A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.

Comment

59. This draft replaces the text of former draft article 10 and is taken from article 7 of the resolution of the Institute of International Law adopted in 1985. It will be recalled that the pertinent provisions of that resolution were set forth (as an alternative approach) in the first report (see A/CN.4/552, para. 123). The purpose of the new draft is to reflect the concerns expressed, both in the Commission and in the Sixth Committee, to the effect that the previous version of the draft article left open the possibility that there would be no difference in the legal effect concerning treaty relations between an aggressor State and a State acting in self-defence. In the Sixth Committee such opinions were expressed by Algeria (2005),[73] China (2005),[74] France (2005),[75] Greece (2005),[76] Islamic Republic of Iran (2005),[77] Japan (2005),[78] Malaysia (2006)[79] and Morocco (2005).[80]

60. The earlier version of the draft article read as follows:

> **The incidence of the termination or suspension of a treaty shall not be affected by the legality of the conduct of the parties to the armed conflict according either to the principles of general international law or the provisions of the Charter of the United Nations.**

61. The replacement of the earlier text is called for on a pragmatic basis, as being a necessary clarification. However, the need for clarification arises in fact from a misunderstanding of the former version. The former draft was intended as a corollary to draft article 3. The outbreak of an armed conflict does not lead automatically to termination or suspension. In any event, this principle of continuity is obviously without prejudice to the law applicable to the relations of the States concerned, including the law relating to the use or threat of force by States, and the powers of the Security Council under Chapter VII of the Charter of the United Nations. There is an important factor of legal security involved (see A/CN.4/552, para. 122). This element was expressed in the Sixth Committee by the United Kingdom:

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[73] A/C.6/60/SR.20, para. 64.
[74] A/C.6/60/SR.18, para. 10.
[75] A/C.6/60/SR.11, para. 75.
[76] A/C.6/60/SR.19, para. 37.
[77] A/C.6/60/SR.18, paras. 6-7.
[78] A/C.6/60/SR.20, para. 22.
[79] A/C.6/61/SR.19, para. 55.
[80] A/C.6/60/SR.11, para. 42.

> We think that this draft article is broadly along the right lines. In accordance with our view that this topic is essentially one that concerns the operation of the law of treaties, we do not think that this is the right place in which to review the law on the use of force. We, of course, agree with the general proposition that an aggressor State should not benefit from its aggression. Nevertheless we also share the Special Rapporteur's view that to allow a simple, unilateral assertion of an illegal use of force as a basis for the termination or suspension of treaties is likely to be inimical to the stability of treaty relations.[81]

62. The root of the difference of opinion is technical and legal. The principle of continuity (as in draft articles 3 and 4) is applied on an ordinal, or sequential, basis, and it applies across the board. Consequently, the principle is entirely without prejudice to the operation of the applicable law, and it is not a principle of validation.

Draft article 11
Decisions of the Security Council

These articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.

Comment

63. The proviso is not strictly necessary but is nonetheless useful in an expository draft. It may be recalled that article 75 of the Vienna Convention on the Law of Treaties provides as follows:

> "*Case of an Aggressor State*
>
> "The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

64. This draft article received general support both in the Commission and in the Sixth Committee.

Draft article 12
Status of third States as neutrals

The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict.

Comment

65. This proviso is not strictly necessary but has a pragmatic purpose. This draft article received general support both in the Commission and in the Sixth Committee.

[81] Summarized in A/C.6/60/SR.20, para. 1.

Draft article 13
Cases of termination or suspension

The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:

(a) The agreement of the parties; or

(b) A material breach; or

(c) Supervening impossibility of performance; or

(d) A fundamental change of circumstances.

Comment

66. Once again it can be said that such a reservation states the obvious. However, it is believed that the clarification has some significance.

Draft article 14
The revival of terminated or suspended treaties

The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.

Comment

67. This reservation has the specific purpose of dealing with the situation in which the status of "pre-war" agreements is ambiguous and it is necessary to make an overall assessment of the treaty picture. Such an assessment may, in practice, involve the revival of treaties the status of which was ambiguous or which had been treated as though terminated by one or both of the parties. The draft article received general acceptance both in the Commission and in the Sixth Committee.

Annex

Text of draft articles (as proposed in the third report)

Draft article 1
Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

Draft article 2
Use of terms

For the purposes of the present draft articles:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(b) "Armed conflict" means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between State parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Draft article 3
Non-automatic termination or suspension

The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:

(a) Between the parties to the armed conflict;

(b) Between one or more parties to the armed conflict and a third State.

Draft article 4
The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

(a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(b) The nature and extent of the armed conflict in question.

Draft article 5
Express provisions on the operation of treaties

Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to

the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

Draft article 5 bis
The conclusion of treaties during armed conflict

The outbreak of an armed conflict does not affect the capacity of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.

Draft article 6[a]

...

Draft article 6 bis
The law applicable in armed conflict

The application of standard-setting treaties, including treaties concerning human rights and environmental protection, continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict.

Draft article 7
The operation of treaties on the basis of necessary implication from their object and purpose

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

2. Treaties of this character include the following:

(a) Treaties expressly applicable in case of an armed conflict;

(b) Treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

(c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

(d) Treaties for the protection of human rights;

(e) Treaties relating to the protection of the environment;

(f) Treaties relating to international watercourses and related installations and facilities;

(g) Multilateral law-making treaties;

(h) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(i) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

[a] Draft article 6 was withdrawn by the Special Rapporteur.

(j) Treaties relating to diplomatic relations;

(k) Treaties relating to consular relations.

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